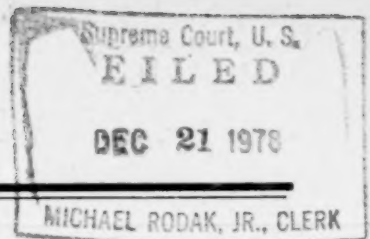


No. 78-129



---

**In the Supreme Court of the United States**  
OCTOBER TERM, 1978

---

BRITISH EUROPEAN AIRWAYS, PETITIONER

v.

ABRAHAM BENJAMINS, ETC., ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

WADE H. MCCREE, JR.  
*Solicitor General*

RICHARD A. ALLEN  
*Assistant to the Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

---

## INDEX

	Page
Question presented .....	1
Statement .....	2
Discussion .....	3
Conclusion .....	16

## CITATIONS

### Cases:

<i>Block v. Compagnie Nationale Air France</i> , 386 F.2d 323, cert. denied, 392 U.S. 905 .....	14
<i>Evangelinos v. Trans World Airlines, Inc.</i> , 550 F.2d 152 .....	13
<i>Martinez Hernandez v. Air France</i> , 545 F.2d 279, cert. denied, 430 U.S. 950.....	13
<i>Maugnie v. Compagnie Nationale Air France</i> , 549 F.2d 1256, cert. denied, 431 U.S. 474 .....	12
<i>Noel v. Linea Aeropostal Venezolana</i> , 247 F.2d 677, cert. denied, 355 U.S. 907.....	3
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 .....	4, 5
<i>Phillips Petroleum Co. v. Texaco, Inc.</i> , 415 U.S. 125 .....	5
<i>Robertson v. Wegmann</i> , 436 U.S. 584 .....	12
<i>Salamon v. Koninklijke Luchtvaart Maat- schappij, N.V.</i> , 107 N.Y.S.2d 768, aff'd, 281 App. Div. 965, 120 N.Y.S.2d 917....	9
<i>Seth v. British Overseas Airways Corp.</i> , 329 F.2d 302, cert. denied, 379 U.S. 858 .....	13
<i>T. B. Harms Co. v. Eliscu</i> , 339 F.2d 823....	4
<i>Tel Aviv, In Re</i> , 405 F. Supp. 154 .....	13

Treaty and statutes:	Page
Warsaw Convention, 49 Stat. 3000 <i>et seq.</i> , T.S. No. 876 .....	2
Article 17 (49 Stat. 3005, 3018) .....	<i>passim</i>
Article 18(1) .....	14
Article 21 .....	11
Article 22 .....	5
Article 24 .....	5, 6, 7, 11
Article 24(2) .....	7
Article 28 (49 Stat. 3020) .....	5
Article 28(2) .....	11
Article 29(1) .....	5
Article 29(2) .....	11
Alien Tort Claims Act, 28 U.S.C. 1350.....	2
28 U.S.C. 1331 .....	1, 2, 3, 5, 14
28 U.S.C. 1332 .....	2
28 U.S.C. 1337 .....	2
42 U.S.C. 1988 .....	12
Miscellaneous:	
Calkins, <i>The Cause of Action Under the Warsaw Convention</i> , 26 J. Air L. & Com. 217 (1959) .....	8, 10
Lowenfeld and Mendelsohn, <i>The United States and the Warsaw Convention</i> , 80 Harv. L. Rev. 497 (1967) .....	3-4, 5, 8, 9, 10, 15
W. Prosser, <i>Torts</i> (3d ed. 1964) .....	9

## In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-129

BRITISH EUROPEAN AIRWAYS, PETITIONER

*v.*

ABRAHAM BENJAMINS, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 2, 1978.

### QUESTION PRESENTED

Whether a wrongful death action concerning an airplane crash in England "arises under" the Warsaw Convention, a treaty of the United States, within the meaning of 28 U.S.C. 1331.

## STATEMENT

Respondent Abraham Benjamins, a citizen of the Netherlands, brought this wrongful death action against petitioner, a corporation of the United Kingdom, to recover damages for the death of his wife that resulted from a crash in 1972 of one of petitioner's aircraft in England. Benjamins filed his complaint in the United States District Court for the Eastern District of New York. His amended complaint<sup>1</sup> alleged federal question jurisdiction under 28 U.S.C. 1331. It alleged that the action arose under Article 17 of the Warsaw Convention, 49 Stat. 3018, T.S. No. 876, which provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

<sup>1</sup> Benjamins' original complaint invoked only the district court's diversity jurisdiction under 28 U.S.C. 1332. That complaint was dismissed because both petitioner and Benjamins are citizens of foreign countries. Benjamins was permitted to amend his complaint, and the amended complaint invoked the court's jurisdiction under 28 U.S.C. 1331, 1337 and 1350 (Pet. 6-7). In the court of appeals, Benjamins argued only the applicability of Sections 1331 and 1350, the Alien Tort Claims Act (Pet. 7; Pet. App. 7a). The court of appeals held that Section 1350 does not establish jurisdiction (Pet. App. 8a); we agree with that conclusion but do not separately discuss it.

On the basis of *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957), the district court held that the Warsaw Convention does not create federal question jurisdiction and dismissed the complaint (Pet. App. 28a). The court of appeals overruled *Noel* and held that the Warsaw Convention creates a cause of action and thus federal question jurisdiction (Pet. App. 9a-16a).<sup>2</sup> A petition for rehearing en banc was denied (Pet. App. 2a).

## DISCUSSION

In our view the petition for a writ of certiorari should be denied because the decision below is correct and because there is no direct conflict among the circuits on the issue.

1. There is no simple or comprehensive formula for use in determining whether a plaintiff's case "arises under the Constitution, laws, or treaties of the United States" within the meaning of 28 U.S.C. 1331. It is possible, however, to mark some outer bounds. There would unquestionably be federal question jurisdiction if the Warsaw Convention provided that an action for injury or wrongful death could be brought against a carrier even if the domestic law of the signatory nation that would otherwise be applicable provided no such cause of action.<sup>3</sup> If that

<sup>2</sup> Judge Lumbard wrote both *Noel* and the present opinion.

<sup>3</sup> Which nation's laws would apply to a particular accident is a separate issue, not presented in this case, and one that is determined by conflicts of law principles. See generally Lowen-

were the Convention's meaning, a plaintiff would assert a right "conferred by federal law [*i.e.*, the treaty], wholly independent of state law." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974). The underlying right would "be based on federal law" (*ibid.*).<sup>4</sup> If, on the other hand, the Convention provided that a claim for relief against a carrier could be maintained only if it were authorized by domestic law, and the Convention simply established conditions or defenses to such an action, then the rights of the plaintiff would arise from domestic law rather than from the Convention. Because no law of

---

feld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 578-586 (1967): When referring to the domestic law of a nation or state, we mean whatever domestic law would apply to a case or an issue in a case under conflict principles.

<sup>4</sup> That a person's rights depend in some way on federal law does not by itself establish federal question jurisdiction. For example, a suit between two persons claiming interests in or ownership of a federal patent or copyright under a contract or license between them does not establish federal question jurisdiction, because the rights in dispute depend directly on state contract law. See, *e.g.*, *T. B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), and authorities discussed there. But a suit by a copyright holder for copyright infringement would be one arising under federal law, because the right asserted is based directly on the federal law protecting copyrights. *Ibid.* If the Warsaw Convention establishes an enforceable cause of action even in the absence of domestic law establishing such a cause of action, a suit against a carrier would be analogous to the latter kind of suit. But if a victim were to assign the right of action, any dispute concerning the validity, scope, or terms of the assignment would be based on (or "arise under") domestic law—in this country, on state law.

the United States establishes a general right to collect damages in air crash cases, plaintiffs would be required to look to state law.<sup>5</sup> And under the "well pleaded complaint" rule of federal jurisdiction, the fact that the Convention provides certain conditions or defenses to a suit based on state law would not establish federal question jurisdiction under Section 1331. See, *e.g.*, *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127-128 (1974); *Oneida Indian Nation v. County of Oneida*, *supra*, 414 U.S. at 675-678.

2. The issue in this case is not free from doubt, because the provisions of the Warsaw Convention are susceptible to either interpretation.

As a general matter the Warsaw Convention was designed to provide uniformity with respect to the liability of air carriers engaged in international air transportation. See generally Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967). The Convention establishes monetary limitations on the carriers' liability (Article 22), a two-year statute of limitations (Article 29(1)), and venue provisions limiting the places a carrier may be sued (Article 28).<sup>6</sup>

---

<sup>5</sup> Petitioner, although contending that the district court lacked jurisdiction because the Convention allegedly does not create a right to recover, does not dispute that the substantive provisions of the Convention would apply to any suit brought in a state court. See Pet. 6-7.

<sup>6</sup> Article 28 provides that an action may be brought "in the territory of one of the High Contracting Parties \* \* \* where [the carrier] has a place of business through which the contract has been made \* \* \*." 49 Stat. 3020. The ticket in this

The provisions of the Convention most pertinent to the issue presented here are Articles 17 and 24. Article 17, quoted in full at page 2 *supra*, provides in relevant part that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger \* \* \*." Article 24 provides:

(1) In the cases covered by articles 18 and 19 [pertaining to baggage losses and losses for delay], any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

The plain language of Article 17 seemingly provides that the carrier shall be liable to the injured passenger or to the deceased passenger's representative whether or not the domestic law of the signatory nations independently provides for recovery. If the language means what it seems to say, it would not be consistent with the Convention for a signatory nation to enact domestic legislation effectively eliminating (or failing to provide) any right of action against air carriers in general or that nation's carriers in particular. More pertinently, it would be inconsistent with the

---

case was purchased in California, and petitioner apparently concedes that venue is proper under the Convention in any court of competent jurisdiction in the United States (see Pet. 6).

Convention for a state of the United States to enact a law providing that no air carrier shall be liable for injury or death arising out of an accident in international air transportation. Under this construction of Article 17, any such state law would fail under the Supremacy Clause, and the right to relief would be one created by and "arising under" the Convention; it would not be one dependent on or limited by state law.

But Article 17, when read in conjunction with Article 24, could be construed to provide that air carriers shall be liable to injured passengers or the representatives of deceased passengers only if they are so liable under the applicable domestic law of the signatory nations, and only to the extent of such domestic law. That construction is supported by Article 24(2), which provides that domestic law shall determine "who are the persons who have the right to bring suit and what are their respective rights."

Under this latter construction, a suit against a carrier would be dependent on the creation of a right by the applicable domestic law. If the applicable law of a nation or state provided no right to relief, then the carrier would not be liable. Under this construction, the provisions of the Convention concerning presumptions of liability, limitations periods, and limitations on liability would continue to govern any suit that was permitted by domestic law, but those provisions would be no more than rules modifying a right of recovery ultimately dependent on the domestic law.

3. The legislative history of the Warsaw Convention sheds little light on which of those two constructions is correct. It appears that the drafters assumed that the domestic law of the signatory nations would authorize recovery against carriers and be consistent with the principle of carrier liability set forth in Article 17. The question of where the right of recovery originates thus is irrelevant for every nation except the United States, and it is relevant here only for the purposes of determining what systems of courts are open to aggrieved plaintiffs. It is thus not surprising that the drafters overlooked the problem. See generally Lowenfeld and Mendelsohn, *supra*; Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Com. 217 (1959). In our view, however, the language and structure of the Convention favor the conclusion of the court of appeals that Article 17 establishes a right that is not dependent on domestic law.

The language of Article 17 is unqualified: "The carrier shall be liable in the event of the death or wounding of a passenger \* \* \*." It would strain that language considerably to assume that it implicitly contains the significant qualification that the right to

---

<sup>1</sup> In French, the official language of the Convention, Article 17 provides in pertinent part: "Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle \* \* \*." See 49 Stat. 3005. For purposes of this issue here, it is not contended that the French version is materially different from the English translation.

recovery must first be found in domestic law.<sup>\*</sup> Had that been the intent of the drafters, one might reasonably suppose they would have used language different from the language of Article 17. As one court stated, "[i]f the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Article 17 did do." *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768, 773 (Sup. Ct. 1951), *aff'd*, 281 App. Div. 965, 120 N.Y.S. 2d 917 (1st Dept. 1953).

The view that Article 17 establishes a right independent of domestic law is supported by scholars who have reviewed the history of the Convention and the literature on it. Lowenfeld and Mendelsohn state (80 Harv. L. Rev. at 517; citations omitted):

In the flood of writing on all sides of the Warsaw Convention, it was apparently always assumed that the Convention created a right of action. Those favoring the Convention considered this to be an important advantage since, as they contended, without it a right of action might have to be founded on foreign law \* \* \* [which] might not provide any recovery for wrongful death or alternatively might restrict recovery to a low limit, perhaps even lower than the Convention limit.

---

<sup>\*</sup> Because the common law of England and the United States generally provided representatives of a decedent no remedy for his death, and wrongful death actions in this country are dependent on statutes (see W. Prosser, *Torts* §§ 120, 121 (3d ed. 1964)), such a qualification could have been significant.

And Calkins, the Chairman of the United States Delegation to the Hague Conference to Amend the Warsaw Convention, stated (Calkins, *supra*, J. Air L. & Com. at 218):

[T]he author is convinced that the draftsmen of the Convention intended to create a right of action based on the contract of carriage; that the draftsmen did in fact carry this intention out in the Convention as signed; that it is self-executing; and therefore the supreme law of the land today.

Those conclusions are further supported by the fact that the drafters of the Convention intended that the defenses of the carrier established by the Convention (*e.g.*, the two-year statute of limitations and monetary limits on liability) were to be exclusive, and thus that the carrier could not rely on additional and greater defenses provided by domestic law (*e.g.*, a shorter statute of limitations or a lower monetary limit on liability). See Lowenfeld and Mendelsohn, *supra*, 80 Harv. L. Rev. at 517. Indeed, the drafters of the Convention rejected a proposal by the Japanese delegation that would have permitted any signatory nation, by domestic legislation, to lower the limitation of liability provided by the Convention. See Calkins, *supra*, 26 J. Air. L. & Com. at 227-228. The drafters' intent that the Convention's defense were to be exclusive suggests their understanding that any right to recover would be based on the Convention, not domestic law, because, if a treaty, or federal law, merely intended to establish certain conditions and defenses

to certain types of actions that are permitted by domestic or state law, it would ordinarily follow that the defendant would be able to rely not only on the treaty or federal defenses, but also on any additional defenses provided by the domestic or state law.<sup>9</sup>

It is true that Article 24 contemplates that domestic law will govern questions of standing, *i.e.*, "who are the persons who have the right to bring suit and what are their respective rights."<sup>10</sup> Article 24 could be construed as authorizing domestic legislation that effectively nullifies the principle of carrier liability that Article 17 appears to have established; *i.e.*, domestic legislation that provides that no one may sue or that no one has any rights. It is more reasonable to conclude that Article 24 provides that domestic law governs questions of allocation of recovery (whether to

---

<sup>9</sup> It may be true that in some cases federal law or policy may preclude certain state defenses to an action based on state law without converting the action to one based on federal law. But, as a general matter, when an action is based on state law, the fact that the defendant may have certain federal defenses does not mean he may not have other, greater, state defenses. For example, in an action for defamation against a federal officer, if the defendant had a federal defense of qualified immunity, he might also have a state defense of absolute immunity.

<sup>10</sup> Other provisions of the Convention also provide that domestic law will govern certain questions. Thus, for example, Article 21 provides that if the carrier establishes contributory negligence, "the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partially from his liability." Article 28(2) provides: "Questions of procedure shall be governed by the law of the court to which the case is submitted." See also Article 29(2).

the estate or to the survivors, and, if to the survivors, to which survivors) rather than questions of carrier liability. Cf. *Robertson v. Wegmann*, 436 U.S. 584, 591-592, 594 (1978); 42 U.S.C. 1988.<sup>11</sup>

4. Petitioner and Judge Van Graafeiland, who dissented below, rely heavily on decisions from other circuits and on a letter from Secretary of State Cordell Hull presenting the Convention to President Roosevelt for transmission to the Senate. In our view, however, there is no conflict among the circuits, and Secretary Hull's letter does not support petitioner's contentions.

a. Only one of the decisions in the other circuits cited by petitioner in support of its position (Pet. 11 n.14) even addresses the issue presented in this case, and that opinion does so only in *dicta*. In *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.), cert. denied, 431 U.S. 474 (1977), the plaintiff sued a carrier, claiming that the carrier was liable under Article 17 of the Convention; jurisdiction was based on diversity of citizenship and was not contested. The plaintiff argued that the scope of Article 17 should be determined by the domestic law that

<sup>11</sup> If, as we submit, the right to recover against a carrier is based on the treaty, questions may arise about the proper source of law on questions, such as standing, which the Convention expressly leaves to domestic law. Judge Van Graafeiland, dissenting below, assumed that federal courts would look to state law to resolve such questions, rather than to develop a federal common law (Pet. App. 23a). Cf. *Robertson v. Wegmann*, *supra*. No such questions are presented on the present record or by the decision below, and it would be appropriate for this Court to await fuller consideration of them by the courts of appeals.

would apply under conflicts of law principles because the right to recover was based on that law. In a footnote, the court said: "It is true that the Warsaw Convention does not create a cause of action [citing *Noel* and other decisions in the Second Circuit] \* \* \*" (549 F.2d at 1258 n.2). The court nonetheless rejected plaintiff's argument and held that the meaning of Article 17 is to be determined by federal law. *Maugnie* thus implicitly supports the position we take here; the court's passing statement that the Convention does not create a cause of action was *dicta* that was not relevant to any jurisdictional issue in that case. The other decisions from other circuits cited by petitioner do not address the question whether the Convention creates right to relief independent of state law.<sup>12</sup>

A decision of the First Circuit that does address the question, however, is in accord with the decision below. In *Seth v. British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.) cert. denied, 379 U.S. 858 (1964), the plaintiff sued for loss of his luggage, relying on

<sup>12</sup> *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977), involved the question whether injuries suffered in a terrorist attack in an airport are covered by Article 17. The court did not discuss the issue presented here, except to note, in accord with the decision below, that "[j]urisdiction is based on 28 U.S.C. §§ 1331 and 1332." 550 F.2d at 153 n.1. *Martinez Hernandez v. Air France*, 545 F.2d 279 (1st Cir. 1976), cert. denied, 430 U.S. 950 (1977), involved the same issue. The court did not discuss the source of the right to relief, and the basis for jurisdiction does not appear in the opinion of the district court (*In Re Tel Aviv*, 405 F. Supp. 154 (D. P.R. 1975)). The other district court and state court cases cited by petitioner (Pet. 11 n.14) for the most part mention the issue only in *dicta*.

Article 18(1) of the Convention and invoking jurisdiction under 28 U.S.C. 1331. The court upheld federal question jurisdiction, stating (329 F.2d at 305): "Seth's action \* \* \* seems clearly to be one arising under a treaty of the United States." Cf. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 331 n. 21 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968), citing *Calkins, supra*, with approval. The decision in this case thus is in accord with prevailing law. The overruling of *Noel* has eliminated a conflict that previously existed. Because, as the court of appeals pointed out, the existence of jurisdiction under 28 U.S.C. 1331 controls only the unusual case in which all of the parties are aliens (see Pet. App. 16a),<sup>13</sup> the question is not sufficiently important to justify review by this Court in the absence of a conflict.

b. Petitioner also relies (Pet. 13-14) on the following statement of Secretary Hull in his letter to President Roosevelt (Pet. App. 10a):

The effect of Article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier.

<sup>13</sup> The question also may arise when the defendant is a domestic air carrier domiciled in the same state as a plaintiff who is a United States citizen. Such cases appear to arise infrequently.

Secretary Hull stated in this passage that Article 17 establishes a presumption of liability—in effect a rule of *res ipsa loquitur* that was contrary to the law of several jurisdictions that required the plaintiff affirmatively to prove the carrier's negligence.<sup>14</sup> Secretary Hull did not identify the source of the right to relief. Thus, as the court of appeals held (Pet. App. 15a), his statement did not express a view on the issue presented in this case. Secretary Hull's statement does not say or suggest that Article 17 does not establish a right independent of domestic law.

Moreover, the statement was only part of a much longer discussion of the Convention (reprinted in Resp. Br. in Opp. App. at 5-a to 11-a). Nothing in that discussion suggests that the Convention does not establish an independent right of recovery, and several statements suggest the contrary. For example, Secretary Hull stated his belief that the Convention would be beneficial to passengers "as affording a more definite basis of recovery" (*id.* at 8-a). He also stated that the Convention's provisions on carrier liability for damaged or loss luggage "appears to accord to passengers and shippers broader rights than they are generally entitled to with regard to other forms of transportation" (*id.* at 10-a). And he generally recommended United States adherence to the Convention because it would promote "uniformity with respect to international air regulations" and is "acceptable as a basis for regulating international transportation of

<sup>14</sup> See Lowenfeld and Mendelsohn, *supra*, 80 Harv. L. Rev. at 519-522.

passengers, baggage, and goods \* \* \*” (*ibid.*). Those views are not harmonious with the notion that the liability of carriers is dependent on the domestic law of each signatory nation.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.  
*Solicitor General*

RICHARD A. ALLEN  
*Assistant to the Solicitor General*

DECEMBER 1978